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No. 82-5298

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANDRES SEGURA AND LUZ MARINA COLON, PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

PAUL E. WARBURGH, JR.
Axelrod & Warburgh
370 Lexington Avenue
New York, New York 10017
(212) 689-8970

PETER J. FABRICANT
Dickstein & Fabricant
24 East 21st Street
New York, New York 10010
(212) 505-0050
Counsel for Petitioners

REX E. LEE
Solicitor General
U.S. Department of Justice
Washington, D.C. 20580
(202) 633-2000
Counsel for Respondent

PETITION FOR CERTIORARI FILED AUGUST 27, 1982.
CERTIORARI GRANTED FEBRUARY 22, 1983

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Date	*Proceeding*
2/19/81	Indictment filed and sealed.
	* * *
2/27/81	. . . indictment unsealed . . . all defendants waived reading of indictment and pleaded not guilty to indictment. . .
	* * *
5/11/81	Before Bartels, J. case called. Defendants present . . . defendants arraigned on superceding indictment and enters plea of not guilty . . . Hearing on motions for suppression of statements and evidence . . . Ordered and begun. Hearing continued to 5/12/81 at 10 a.m.
	* * *
5/21/81	Before Bartels, J. case called. Defendants and counsel present. Hearing resumed. Government rests. . .
5/13/81	Before Bartels, J. case called Defendants and counsel present. Hearing resumed. Oral argument of defendant's motion by counsel. Hearing continued to 5/14/81 at 10 a.m.
5/14/81	Before Bartels, J. case called. Defendants and counsel present. Further oral argument of defendants Segura and Colon's motion to suppress evidence held. The court rules that the motion of defendants Segura and Colon for suppression of evidence are granted. . . Government to file interlocatory appeal.
	* * *
5/15/81	Government's notice of appeal filed.
5/19/81	By Bartels, J. memorandum of decision and order, dated 5/19/81 granting defendants Segura and Colon's motion to suppress evidence . . . filed.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6/2/81	**Appellant, U.S.A., motion for expedited appeal filed.**
	* * *
6/11/81	**Order granted appellant, U.S.A. motion for expedited appeal filed . . .**
	* * *
8/13/81	**Case argued before: Meskil, Kearse, C.J.J., Coffrin, D.J.**
11/6/81	**Judgment affirmed in part and reversed in part, Kearse filed.**
	* * *

Date	*Proceeding*
11/20/81	Appellees, Segura and Colon, petition for rehearing with suggestion for rehearing in banc filed.
	* * *
12/30/81	Order denying appellees, Segura and Colon, petition for rehearing with suggestion for rehearing in banc filed.
1/7/82	Mandate issued (opinion and judgment).
	* * *

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

1/26/82	Before Bartels, J. case called. Defendants and counsel present. Trial ordered and begun...
	* * *
1/27/82	Before Bartels, J. case called. All sides present. Trial resumed...
1/28/82	Before Bartels, J. case called. All sides present ... Trial resumed ... Jury finds defendants, guilty to counts one, two, three, and five of superceding indictment ... Defendants' motion to set aside verdict and for judgment of acquittal reserved to Friday, 2/19/82. Sentencing set for 2/22/82.
	* * *
2/22/82	Before Bartels, J. case called. Counsel for all sides present. Defendants' motion for judgment of acquittal argued—denied. The defendant is sentenced to ... a total of ten years imprisonment plus a special parole term of fifteen years.
	* * *
	Defendant [Colon] is sentenced to ... a total of eight years imprisonment and a special parole term of fifteen years.
	* * *
2/22/82	Notice of appeal filed. Forma Pauperis granted.
	* * *

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6/15/82	**Case argued before: Oakes, Meskill, Kearse, C.J.J.**
6/29/82	**Judgment affirmed by detailed court order without opinion filed.**
	* * *
9/2/82	**Notice of filing petition for certiorari with Supreme Court filed.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

81-CR-80(S)

UNITED STATES OF AMERICA

-against-

ANDRES SEGURA, LUZ MARINA COLON,
ENRIQUE RIVUDALLA-VIDAL AND ESTHER PARRA,
DEFENDANTS.

DISTRICT COURT'S MEMORANDUM OF DECISION AND ORDER—MAY 15, 1981

BARTELS, District Judge.

Andres Segura and Luz Marina Colon were charged in an indictment, (1) with conspiring to violate 21 U.S.C. § 841(a)(1), by intentionally distributing and possessing with intent to distribute quantities of cocaine, and (2) with three substantive counts of possession with intent to distribute and distribution on February 12, 1981 of ½ kilo of cocaine at one time, and 1 kilo of cocaine at another. Enrique Rivudalla-Vidal and Esther Parra were charged in one count of the same indictment with possession with intent to distribute ½ kilo of cocaine on the same day. In an opinion delivered from the bench, hereby clarified, this Court denied one motion by two of the defendants to suppress certain evidence, and granted another motion to suppress by two other defendants.

FACTS

In January, 1981, members of the New York Drug Enforcement Task Force received information from a liaison unit that certain persons were dealing heavily in cocaine out of an apartment located at 12-10 Astoria Park South in Queens. Undertaking physical surveillance of the building, DEA agent Palumbo and N.Y.C. Detective Frawley ascertained that the occupants of the apartment were Segura and Colon. From about January 26, 1981 until the time of

their arrest, Segura and Colon were under virtually constant surveillance by the agents. On February 7, Segura and Colon were observed moving into a new apartment on 147th Street in Flushing. On February 9, Segura was observed driving in an erratic and evasive manner until finally, after making two illegal U-turns, he stopped near the intersection of 221st Street and Northern Boulevard, where Rivudalla was awaiting him in the middle of the block. Rivudalla then got into Segura's car, and engaged in a brief conversation with Segura.

On February 12, the agents trailed Segura and Colon from their 147th Street apartment to the Burger King located at 222nd Street and Northern Boulevard in Queens, and observed them enter that establishment. Not long afterwards, Rivudalla and Parra, accompanied in their car by an unidentified male, drove into the Burger King lot and parked near Segura's car. Parra and the other male remained in the car while Rivudalla entered the Burger King, and sat down at a table with Segura. Colon was seated nearby. At a certain point, the agents observed Segura motion to Colon who, after stopping for a brief word at Segura's table, then exited to the lot carrying a large shoulder bag. The bag appeared to the agents to be bulging in the middle. Colon then entered the car in which sat Parra and the other male, and exited it shortly thereafter, "zippering-up" the shoulder bag, which the agents observed to be "noticeably smaller in bulk then when she was observed entering the car."

Colon reentered the Burger King. Rivudalla remained for a few moments with Segura, and then left, reentered his car, and drove off. The agents also drove off in two cars after them. At a certain point Rivudalla stopped to let off his male passenger, and then proceeded to 90th Street and 34th Avenue in Jackson Heights. Both Rivudalla and Parra exited the car, and began walking towards 90-10 34th Avenue when Detective Frawley, whose car was the first at the scene, aproached the pair. According to Frawley's testimony, Rivudalla became quite nervous as soon as Frawley identified himself, and Parra seemed almost faint, her eyes watering over. Frawley asked questions of Rivudalla con-

cerning his license and registration which, when produced, showed two different addresses.

About this time Palumbo joined the trio, and asked Rivudalla from where he had just come. Rivudalla replied first, that he had just come from home, and then changed his answer and said that he had come from his place of work on 14th Street in Manhattan. Palumbo then asked if he had just come from the Burger King on Northern Boulevard, or if he knew someone named "Andre". Rivudalla replied negatively to both questions. Thereupon Frawley asked Rivudalla whether he had a gun, to which he replied that he did not, and allowed Frawley to pat him down.

Palumbo then turned his attention to Parra, positioning himself in front of her while Frawley was opposite Rivudalla. He asked her in Spanish whether she had a gun. She shook her head, indicating "no." He then pointed to a paper bag he had observed her clutching under her arm, and asked her whether she had a gun in the bag. Parra shook her head again, indicating "no," and then extended the paper bag towards Palumbo, briefly opening it to establish the truth of her assertion. Palumbo, standing only 2-3 feet from her, was able to look down into the bag and see a glassine envelope containing white powder. Parra quickly closed the bag, and brought it back under her arm. Palumbo then motioned to her with his finger to give the bag to him, which she did, albeit reluctantly. Looking inside again, Palumbo confirmed his original observation of the glassine bag. Rivudalla and Parra were then immediately placed under arrest. The powder was field tested by the agents, and produced a positive reading for cocaine.

Rivudalla and Parra moved to suppress the ½ kilo of cocaine on the ground that their arrest was invalid because of an unauthorized *Terry* stop, which resulted in an invalid seizure at that time of the cocaine. Segura and Colon, for their part, moved for suppression of the 1 kilo of cocaine, a .38 revolver, considerable amounts of currency, and various narcotics records and paraphernalia because of a warrantless entry and warrantless arrest of Colon at their apartment on 147th Street in Flushing, Queens on February 12-13, 1981. A full hearing was held at which the Court

heard testimony from some of the officers involved in the arrests, searches, and seizures, and from defendant Rivudalla himself.

I. THE "TERRY" STOP

Both Rivudalla and Parra challenge the sufficiency of the Government's basis for detaining them on the street for investigative purposes. We, therefore, turn to the law governing this stop, arrest, and seizure. The general principle which governs such a stop is that given "specific and articulable facts which, taken together with rational inferences from those facts," warrant suspicion of criminal conduct on the part of specific individuals, investigating officers may briefly detain those individuals on the street and question them about their identities or even ask that they explain "suspicious circumstances." *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). The Court finds that the agents were able to point to such facts in Rivudalla and Parra's case.

First, the meeting of February 9, 1981 between Rivudall and Segura in Segura's car brought Rivudalla into the ongoing surveillance operation being conducted by the Drug Enforcement Task Force with respect to Segura and Colon. Second, the suspicious conduct occurring shortly before the stop at the Burger King (to wit, the agents' having observed Colon enter Rivudalla's car with a bulging shoulder bag, and exit with that bulge no longer present), could only increase the agents' suspicions that Rivudalla and Parra were engaged in a narcotics transaction with Segura and Colon. While these circumstances might have appeared to be ordinary when viewed by a layman, the experienced agents, used to the operating procedures of narcotics traffickers, were able to draw inferences of criminal conduct requiring an investigative stop.

At the threshold, it is necessary to decide the question whether Rivudalla as well as Parra is permitted to challenge the validity of the seizure. This inquiry, once considered to be one of "standing" to contest the seizure, has recently been deemed to be "simply whether the defendant's

rights were violated by the allegedly illegal search or seizure". *United States v. Salvucci*, 100 S.Ct. 2547, 2551 n.4 (1980). In *Salvucci* the Court abandoned the "automatic standing" rule of *Jones v. United States*, 362 U.S. 257 (1960), and held "that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated." 100 S.Ct. at 2549.

In the companion case of *Rawlings v. Kentucky*, 100 S.Ct. 2556 (1980), the Court explained that the key to resolving that Fourth Amendment inquiry was whether or not the defendant "possessed a 'legitimate expectation of privacy' in the area searched." *Id.* at 2561 (*quoting Katz v. United States*, 389 U.S. 347 (1967)). Most importantly for the purpose of this case, the Court also held that mere ownership of the property seized is insufficient to allow a defendant to challenge the search, without the further showing that the defendant "took normal precautions to maintain his privacy" in the goods he owned. 100 S.Ct. at 2561. In *Rawlings* the petitioner had placed certain drugs, concededly his, inside the purse of one of the occupants of the house in which he was arrested. In fact, at the time of his arrest he was seated next to that individual, and her purse was in the space between them. The Court held that the petitioner's Fourth Amendment rights had not been violated, since "the precipitous nature of the [transfer of drugs to her purse]" could not support the inference that he maintained his privacy expectation. For one thing, petitioner did not have the right to exclude others from having access to the purse, nor had he ever "sought or received access to her purse prior to that sudden bailment." *Id.* And the Court held further that "even assuming ... that [the woman] did consent to the transfer of possession", the rapid, one-time transaction was not the sort of property transfer as would indicate that the petitioner had maintained his privacy expectation. *Id.*

Rivadulla seeks to fill in the gaps that existed in the petitioner's case in *Rawlings*, by an offer of proof that: a) Rivadulla was the owner of the ½ kilo of cocaine; b) Parra was his agent to receive the cocaine from Segura's agent

Colon; c) following delivery to Parra, she was his bailee and the cocaine never left Rivadulla's sight, nor did Parra ever leave his sight; and d) that Rivadulla therefore took such precautions in excluding other people from having access to the paper bag as justify this Court's concluding that he maintained his expectation of privacy in the contents of that bag. The Court is of the opinion that even if Rivudalla had been able to establish the facts he offers to prove he would still fail to show a Fourth Amendment violation. One weakness in Rivudalla's bailment theory is that in fact it was shown that Rivudalla was not the purchaser of the cocaine, but only held it on consignment from Segura.

Moreover, Rivadulla admits that at the time Colon allegedly delivered the cocaine to Parra, there was another male seated in the car with her. Rivudalla, remaining in the Burger King for a space of time following the delivery, was not in a position to exclude him from access to the paper bag. In addition, the Court of Appeals in this Circuit has held that unless an individual "signal[s] an expectation of privacy by taking special precautions to secure and secrete the contents of a container" which, like a paper bag, is "not 'inevitably' used for the transport or safeguarding of personal effects," that container is subject to a warrantless search. *United States v. Mannino*, 635 F.2d 110, 114 (1980) (unsecured plastic bag on car seat); *accord*, *United States v. Markland*, 635 F.2d 174, 177 (2d Cir. 1980) (closed plastic beverage bag lying on ground near overturned jeep). Quite simply, a bailment of a paper bag does not demonstrate that one has taken "normal precaution[s] to maintain [one's] privacy" under *Katz* and *Rawlings*.

Rivadulla's testimony is equivocal at best as to how the paper bag even got into his car. He is willing to state that once it did get into his car, it was "his", but this is sufficient only to show bare possession, not ownership. Adopting the agent's testimony that Rivadulla failed to object to the actual seizure of the paper bag from Parra by Palumbo, the Court must conclude that Rivadulla had no expectation of privacy with respect to the cocaine in the bag held by Parra. As stated in *Rawlings*, "'arcane' concepts of property law ought [not] control the ability to claim

the protections of the Fourth Amendment." 100 S.Ct. at 2562. While Rivadulla cannot challenge the property of the seizure, Parra can. The Court having decided that the police had a basis for the *Terry* stop, the next problem is whether they had probable cause for the arrest and search and seizure incident to that arrest. Facts quickly developed following the initial stop which matured the agents' reasonable suspicions into probable cause for the arrests. Specifically, the Court finds that the untruths told by Rivudalla when questioned concerning his whereabouts, and in particular his disclaimer of having just been at the Burger King with "Andre", coupled with the possession by Parra of a brown paper bag, Parra's and Rivudalla's extreme nervousness, and finally Parra's voluntary thrusting of the bag towards agent Palumbo in order to establish that she had no gun inside, gave the agents the probable cause they needed to arrest both Rivudalla and Parra. The turning point was the moment Palumbo glimpsed the glassine envelope with the white powder for the first time. At that juncture he was justified in seizing the bag from Parra and placing both under arrest.

Counsel for defendant Parra has advanced the view that the questions asked by Palumbo of Parra—specifically whether she had a gun in the paper bag—were not related to the purpose of the stop, but were a mere ruse designed to allow him to look inside the bag for drugs. Since it is customary for those dealing in narcotics to carry guns, Palumbo was justified in asking the gun questions, even if his major purpose was to ascertain if she possessed any cocaine.

Accordingly, the motions to suppress the ½ kilo of cocaine are denied.

II. THE ENTRY INTO THE APARTMENT EXIGENT CIRCUMSTANCES

Following the taking of Rivudalla and Parra into custody, Rivudalla made certain statements indicating to the agents that Segura probably possessed more cocaine in his apartment. From the statements, the agents also concluded, properly, that they had probable cause to arrest both Segura and Colon. Indeed, when Segura first contacted

Rivudalla he offered to sell him one kilo of cocaine, but Rivudalla indicated he would buy only ½ kilo. The agents accordingly notified the Office of the United States Attorney of the situation, and that according to Rivudalla's account, Rivudalla would be expecting a call from Segura later that same evening of February 12 to see whether the cocaine had been sold. Thereupon the agent sought, about 6:30 P.M., to obtain a search warrant for the apartment on 147th Street, so as to seize the cocaine before Segura would learn of Rivudalla's arrest and possibly destroy the cocaine in his possession.

On being informed that the lateness of the hour (6:30 P.M.) precluded them from being able to obtain a warrant until the following morning, the agents were advised by the Assistant United States Attorney to proceed directly to Segura's and Colon's apartment and arrest the pair and secure the premises pending the issuance of that warrant. They arrived around 7:30 P.M., and positioned themselves both outside the building and inside the fire stairway opening onto the third floor, the floor on which the apartment, 3D, was situated. From their fire stairway vantage point they were able to observe anyone entering or leaving 3D. While there, agent Shea of the Task Force placed his ear to the door of 3D, but heard nothing. After an uneventful three hours of waiting on the third floor, the agents inside the building joined the others outside, and all waited outside.

Around 11:15 P.M. Segura appeared, and as he began to enter the locked door at the lobby, he was apprehended, and placed in handcuffs under arrest. The agents, led by Shea, informed him that they wanted to go upstairs to 3D, to which Segura replied that he did not live in the building or in that apartment. Forcibly bringing him to the third floor, the agents began down the hallway, at which point Segura again resisted. Shea again forced him down the hallway to the door of 3D, an apartment which is located in the rear of the building, with no view of the front of the building where the arrest took place. Shea knocked on the door of 3D, with Segura standing, handcuffed, in front of him. Luz Colon, unknown to Shea at the time as such, opened

the door. Detective Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest warrant, or a search warrant. Nor did any of the officers ask for or receive consent to enter apartment 3D.

Upon entering, Shea saw, in addition to the woman they later learned to be Colon, two other women and one man. They were Ms. Alvarez, Ms. Castro, and Mr. Tobon-Castro. All were arrested forthwith. As Colon was about to be escorted out of the apartment, she indicated that she wished to take her shoulder bag with her. Thereupon Officer Prakin of the Task Force opened it, and withdrew a leather toilet case, containing a loaded .38 revolver, which he promptly seized. The arrestees were then taken out, and driven to DEA headquarters. At least two agents remained in the building from the late hours of February 12, until around 6 P.M. the following day when they were finally notified of the issuance of a search warrant, and conducted a thorough search of the premises. There was thus a lapse of some 18-20 hours from the entry into the apartment to the execution of the search warrant, during which time the officers remained inside the apartment and in complete control of it. On searching the apartment, the agents found one kilo of cocaine, over $50,000 in U.S. currency, several rounds of .38 calibre ammunition, and records of narcotics transactions. In an earlier, cursory search of the apartment for the presence of other persons, the agents had turned up various items of narcotics paraphernalia, including a scale, jars of lactose, and a number of Baggies, all in plain view.

In the context of this background, the Court is persuaded that there was no consent to the entry of the apartment, no hot pursuit of any suspects, and no flushing of the toilet, scurrying of feet, nor slamming of doors in agents' faces such as would indicate the imminent destruction of evidence. *See Payton v. New York*, 100 S.Ct. 1371 (1980); *United States v. Gomez*, 633 F.2d 999, 1007-08 (2d Cir. 1980); *United States v. Levine*, 500 F.Supp. 777 (W.D. N.Y. 1980). It is the Government's position that exigent circumstances existed, however, in that if the agents had

not entered 3D and arrested the lessee, Colon, she would have been free to destroy any incriminating evidence or contraband during the time between Segura's arrest and the issuance of a valid warrant. The Court rejects that argument. In *United States v. Agapito*, 620 F.2d 324, 336 n.18 (2d Cir. 1980), the Court held that officers who warrant an individual outside of the premises may conduct a security check inside the premises only where "the arresting officers ... have (1) a reasonable belief that third persons are inside, *and* (2) a reasonable belief that the third persons are aware of the arrest outside so that they might destory evidence, escape, or jeopardize the safety of the officers or the public." (Emphasis supplied.) Neither of these conditions were satisfied in this case. The agents were unaware of the presence of Luz Colon inside the apartment, based on their own surveillance of the premises from 7:30 to 10:30 P.M. Agent Shea testified, in fact, that he "did not" know whether anyone was in the apartment when he arrived, that he heard nothing when he listened, and that he was not able to see any lights on in the apartment. (Tr. at 394-96). Nor, as the Government argues, did it necessarily follow that Colon was in the apartment just because she was not with Segura when he was arrested. One may reasonably infer that Segura's resisting the officers' wishes to go to 3D was due to his knowledge that there was cocaine in the apartment, assuming he had such knowledge, rather than that Colon was there.

As to the second condition, the third persons in the apartment only became aware of Segura's arrest when Shea knocked at the door and walked in with Segura in handcuffs. This was too late. There was no evidence whatsoever that before that moment anyone saw Segura being arrested, or even that anyone had seen Rivudalla and Parra being arrested, and communicated that information to the inhabitants of 3D. The police cannot "create their own exigencies through illegal conduct and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence or flee." *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980).

The Government's reliance on *United States v. Campbell*, 581 F.2d 22, 25 (2d Cir. 1978), is misplaced. There the Court set forth the factors deemed relevant in determining whether there exists such an exigency as would justify a warrantless entry into a home. Notably absent in this case are factors numbered four and five, to wit, "strong reason to believe that the suspect is in the premises being entered" and "a likelihood that the suspect will escape if not swiftly apprehended." The prudent course for the officers to have taken while awaiting a warrant was for them to have stationed themselves outside the apartment door, where they would not only have been able swiftly to apprehend Colon should she seek to flee, but would also have been in a position to hear the telltale signs that evidence was sought to be destroyed, signs that were not present here.

The officers in this case, absent exigent circumstances, had no right to cross the threshold of apartment 3D either to arrest Luz Colon, or to search for contraband. The entry in this case was illegal; Colon's arrest was illegal, and the search incident to that arrest, as well as the seizure of items in plain view of the apartment during a security check, was illegal. The fruits of the searches and seizures must be suppressed, to wit, the .38 calibre revolver and the narcotics paraphernalia.

EXECUTION OF THE SEARCH WARRANT

The real problem in this case is the effect of the search warrant issued after the premises were illegally secured. After hearing the evidence, the Court concludes that there was sufficient information contained in the affidavit independent of any information that the agents gathered at the time of the illegal entry to justify the issuance of the warrant by the magistrate. In other words, the warrant was valid. An important case governing the effect of a later, and valid warrant is *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974), where one agent sought to obtain a search warrant while other agents were dispatched to "secure" Griffin's apartment. On arriving at Griffin's apartment, the agents knocked on the

door, and receiving no answer forcibly entered the premises. The agents were not in a hot pursuit of anyone, and had no proof that anyone was in the apartment. Upon entry they conducted an initial seizure of items found in plain view. Four hours after the entry, during which time the agents remained in the apartment and in fact arrested one of the returning occupants, a warrant was issued and a thorough search conducted. There was no dispute that the affidavit upon which the search warrant was procured did not contain any facts discovered as a result of the initial entry. The Court held that the entry was illegal, on the ground that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one." *Id.* at 961. The Court found that evidence discovered pursuant to a later search must be suppressed on the ground that discovery was not "inevitable" merely because an officer had been dispatched to obtain a warrant, and that to allow the police to proceed in such a manner "would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." The facts in this case and the facts in *Griffin* are indistinguishable, since in neither case did exigent circumstances exist justifying a warrantless entry into the home.

The Court of Appeals in this Circuit has recently expressed some views of the principles here involved in the case of *United States v. Alvarez-Porras*, 643 F.2d 54 (2d Cir. 1981). In that case three searches were made of an apartment. One was held illegal by the district court. In the second search two hours later the Government agents had held the suspects in custody awaiting word that a search warrant, already applied for, had been issued. A distorted transmission came over the officers' portable radio which led them to believe that the warrant had been signed, pursuant to which they proceeded to search the apartment. In the course of the search they learned that the warrant had not been signed. Thereupon they temporarily discontinued the search. Later, when the warrant arrived, the third search was begun.

The Court held that the seizure of the incriminating evidence during the second search was proper since the agents acted in good faith in trying to comply with the warrant requirement, and that the purposes of the exclusionary rule would not have been served by excluding the evidence. It stressed, however, that its decision did not rest on the broad exception for "inevitably discoverable material." Indeed, the Court relied on *Griffin, supra*, as an example of a case where "the purposes of the exclusionary rule were served by suppressing the evidence, lest the police be encouraged to execute warrants before they have been issued and before they have been properly presented to those persons at the scene of the intended search, [since] as a general matter . . . [t]o allow officials to make an unlawful search and then repeat the search pursuant to a warrant would sanction the very misconduct the exclusionary rule was intended to proscribe." Further, the Court agreed that an unlawful search could not be validated simply by repeating the search pursuant to a valid warrant, citing *Vale v. Louisiana*, 399 U.S. 30 (1970). *See Alvarez*, 643 F.2d at 65.

Alvarez-Porras in no way justifies the admission of evidence seized in this case. Here the agents knew a warrant had not been issued, and accordingly the 18-20 hour delay in the issuance of the warrant, during which time the agents remained in illegal possession of the premises, rendered the execution of the warrant unreasonable within the meaning of the Fourth Amendment, and deprived the lawful occupant of the apartment, Luz Colon, of her right freely to occupy and control the same. The evidence would not inevitably have been discovered. In fact, Colon might well have destroyed the evidence had she not been illegally excluded. The suppression of the evidence subsequently seized pursuant to the warrant would therefore serve the deterrent purposes of the exclusionary rule.

United States v. Galante, 547 F.2d 733 (2d cir. 1976), *cert. denied*, 431 U.S. 969 (1977), relied on by the Government, is inapposite. In that case the chain of causation between the initial search and the subsequent seizure by the officers was broken by the intervening cooperation of the occupant, a fact not present in this case. To validate the

search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong. The illegality of the initial entry and arrest, coupled with the unreasonableness of the delay in securing a warrant during the exclusion of Colon from her home, require the suppression of the evidence seized from that home on February 13, to wit, the kilo of cocaine, the currency, the .38 ammunition, and the narcotics records. The motions to suppress of Segura and Colon are hereby granted.

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Rule 12(e), F.R.Cr.P.

SO ORDERED.

/s/ JOHN R. BARTELS
JOHN R. BARTELS
United States District Judge

Dated: Brooklyn, N.Y.,
May 15, 1981.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1711—September Term 1980

(Argued: August 13, 1981 Decided: November 6, 1981)

Docket No. 81-1181

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

—against—

ANDRES SEGURA AND LUZ MARINA COLON,
DEFENDANTS-APPELLEES.

OPINION—NOVEMBER 6, 1981

Before: MESKILL and KEARSE, *Circuit Judges*, and COFFRIN, *District Judge*.*

KEARSE, *Circuit Judge:*

The United States appeals from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, suppressing evidence seized by law enforcement officials from the apartment of defendants-appellees Andres Segura and Luz Marina Colon, who are charged in four counts of a five-count indictment with conspiracy to commit an offense under the narcotics laws in violation of 21 U.S.C. 846 (1976), and with possession and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) (1976). Some of the evidence seized from the apartment was discovered prior to the issuance of a search warrant and some was discovered in the search that followed issuance of the warrant. We affirm the district court's suppression of

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* Honorable Albert W. Coffrin, of the United States District Court for the District of Vermont, sitting by designation.

the pre-warrant evidence, but reverse the order to the extent that it suppressed evidence discovered after the issuance of the search warrant.

FACTS

In January 1981, members of the New York Drug Enforcement Task Force ("Task Force"), having received information relating to heavy trafficking in cocaine, had begun a virtually constant surveillance of Segura and Colon. On February 12, at approximately 5:00 p.m., Task Force agents followed Segura and Colon to a Burger King in Queens, where they observed Segura and Colon effect what appeared to be the delivery of a bulky item to Enrique Rivudalla-Vidal and Esther Parra. The agents followed Rivudalla and Parra, and at approximately 5:30 stopped them for questioning. Upon learning that a paper bag carried by Parra contained a glassine bag of white powder, the agents placed Rivudalla and Parra under arrest. The white powder was eventually determined to be approximately one-half kilogram of cocaine. After being advised of his constitutional rights, Rivudalla stated that he had received the cocaine from Segura. He added that they had originally planned a one kilogram sale, but that he had requested the smaller quantity because he was unsure of his ability to sell a full kilogram, and that Segura was to telephone him at approximately 10 p.m. to learn whether he had been successful in selling the half kilogram.

At approximately 6:30 p.m., one of the agents telephoned an Assistant United States Attorney for the Eastern District of New York to request permission to arrest Segura and Colon and authorization to search their apartment. The Assistant authorized the arrests, but stated that a search warrant was unobtainable that evening and instructed the agent merely to secure the apartment without searching it.

At 7:30 p.m. three agents, led by Special Agent Patrick Shea of the United States Drug Enforcement Agency ("DEA"), who was assigned to the Task Force, set up surveillance of the defendants' apartment from the fire stairs near the door of the apartment, 3D. At that time the agents had no reason to believe anyone was inside the apartment.

No lights were visible. Shea pressed his ear to the apartment door, but heard no sounds from within. Segura's car was not parked in the vicinity. For nearly three hours no one entered or left the apartment as the agents watched from the fire stairs. At about 10:30 the agents left the fire stairs to set up surveillance outside the building.

At approximately 11:15 p.m. Segura entered the building alone. The agents followed him into the vestibule and, as he unlocked the inner door, arrested him. Agent Segura told Segura they were going to "go up to the apartment." Segura denied living in the building, but the agents forcibly took him to apartment 3D. Shea knocked on the door, which was answered by a woman later identified as Colon. Shea showed his badge and told Colon that Segura had been arrested and that a search warrant was being obtained; then he and the other agents and Segura entered the apartment. The agents neither requested nor received permission to enter.

Once inside, the agents discovered three other persons present with Colon. Two of the agents immediately conducted a security check to ensure that no one else was present who might constitute a threat to their safety or destroy evidence. During this limited inspection they discovered a triple-beam scale and several jars of lactose in plain view on a bedroom table and numerous small cellophane bags in a bedroom closet.

Eventually, Colon was placed under arrest, and she, Segura, and the other three persons found in 3D were taken to DEA headquarters. As Colon was preparing to depart, she sought to take her shoulder bag with her. Before permitting this, one of the agents searched the bag for a weapon and discovered a loaded .38 caliber revolver and more than $2,000 in cash.

Two agents remained in the apartment to secure it until a search warrant was issued. Because of "administrative delays," application for the warrant was not presented to a magistrate until approximately 5 p.m. the following day. The warrant was issued and then executed at about 6 p.m., some nineteen hours after the initial entry. In the search pursuant to the warrant agents discovered 1,250 grams of

cocaine in an attache case, 58 grams of cocaine in the pocket of a coat in the bedroom closet, 18 rounds of .38 caliber ammunition, more than $50,000 in cash, and records of narcotics transactions. The agents seized all of these items, together with the items discovered during the security check of the previous night.

This prosecution followed. Segura and Colon moved to suppress the items seized from their apartment on the ground that the entry and search violated their rights under the Fourth Amendment to the Constitution. The government contended that the entry into the defendants' apartment was justified by exigent circumstances because the agents feared Colon would destroy the evidence they believed was there before a search warrant could be obtained. After an evidentiary hearing, the district court ruled that the entry was not justified. Further, the court concluded that although the search warrant eventually obtained was valid, all of the evidence seized should be suppressed because the 19-hour delay made execution of the warrant unreasonable and because had it not been for the unlawful entry, the evidence seized might not have been there 19 hours later.

The government has appealed, as permitted by 18 U.S.C. § 3731 (1976), and renews here its contention that exigent circumstances justified the entry. In the event that we reject this argument, the government urges that we reverse the suppression of evidence other than the gun since that evidence was not "seized" until after issuance of the search warrant, or, alternatively, that we reverse the suppression order insofar as it related to evidence discovered after issuance of the warrant.

DISCUSSION

We conclude, on the authority of *United States v. Agapito*, 620 F.2d 324 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980), that the entry was not justified, but that the evidence discovered pursuant to the valid search warrant should not have been suppressed.

A. *The Entry*

It is fundamental that warrantless searches and seizures are unreasonable within the meaning of the Fourth Amendment unless they fall within one of the few, well-delineated exceptions to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The government argues that the warrantless entry of the Task Force agents into the apartment of Segura and Colon to prevent the destruction of evidence was lawful under an exception for "exigent circumstances." Although this Circuit has upheld a warrantless entry into an apartment for the purpose of preventing the destruction of evidence, *United States v. Vasquez*, 638 F.2d 507, 529-32 (2d Cir.1 980), we conclude that the prerequisites for such an entry were not met in the present case.

The preconditions that will justify a warrantless entry into premises, following an arrest outside, for a security check to prevent the destruction of evidence were set forth by this Court in *United States v. Agapito, supra*. There we stated that

> the arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public.

620 F.2d at 336 n.18. In *Agapito*, DEA agents had conducted a two-day surveillance of a 17th floor hotel room, following which they arrested, in the hotel lobby, the only two persons believed to have occupied the room. After the arrests the agents entered the room and seized a suitcase; they remained in the room intermittently for nearly twenty-four hours until a search warrant was obtained. We found that the actions of the agents satisfied neither prerequisite for a warrantless security check. First, the agents had no reason to believe that third persons were in the room, since their surveillance of the room had not revealed the presence of any occupants or visitors whom they had not already apprehended. Second, the arrest of the occu-

pants had taken place in the hotel lobby, seventeen floors removed from the room.

> Thus, even if the agents here thought that accomplices remained in the room, there was no reason for them to believe that the accomplices knew of the arrests so that they might destroy evidence...

Id. at 336. Hence we held that the entry into the hotel room was unlawful.

Despite the differences in times and distances, we find no material distinction between *Agapito* and the present case. The Task Force members in the present case had kept apartment 3D under surveillance for some three hours, during which they had seen no lights, heard no sounds, even with an ear pressed against the door, and seen no person entering or leaving. They had no reasonable belief that anyone was in the apartment. We are unpersuaded by the government's argument that Segura's arrival at home alone made it reasonable to believe that Colon was already at home. She could as easily have been elsewhere, especially since there had been no signs whatever that 3D was occupied. Nor is there reason to reach a contrary conclusion on the basis of the government's argument that Segura might have learned, through his expected 10 o'clock call to Rivudalla or otherwise, that Rivudalla had been arrested. The surveilling agents heard no sound of a telephone ringing in 3D nor any other activity to suggest that anyone had communicated that information to Colon.

Even if Segura's arrival alone made it reasonable to suspect that Colon was in 3D, there was no reason to believe that anyone in the apartment knew of Segura's arrest and was therefore about to destroy evidence. The arrest took place in the lobby of the apartment building, two floors below the apartment. The arrest could not have been observed from 3D, and there was no evidence that anyone saw the arrest and reported it to the inhabitants of 3D.

The government nonetheless attempts to bring the agents' actions within the second *Agapito* prerequisite by arguing that their knock at the door of 3D, along with the preceding commotion as they forcibly brought Segura to the apartment, alerted the inhabitants of the apartment to

Segura's arrest and made it likely that they would destroy whatever evidence was there. Such exigency as inhered in these conditions, however, was of the agents' own making. They had no need to drag Segura to his apartment or to knock at the door. We will not expand the exception made for emergency security checks by permitting the agents to "create their own exigencies . . . and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence." *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980); *United States v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974) (agents' knocking at door, creating emergency, did not exempt them from warrant requirement: "when the emergency justification is advanced, we believe it is appropriate to appraise the agents' conduct during the entire period after they had a right to obtain a warrant and not merely from the moment when they knocked at the front door.")

The government's reliance on our decision in *United States* v. *Vasquez*, *supra*, in which we upheld a warrantless entry for a security check, is misplaced since that decision was based on several facts that are not present here. First, the pertinent arrests in *Vasquez* took place on the street, within sight of the fourth-floor apartment in question, thus creating the risk at the outset that the arrests were known to those remaining in the apartment. Further, the circumstances in *Vasquez* made it quite reasonable for the agents to believe that someone remained in the apartment. And finally, one of the persons arrested on the street led the officers to an apartment on the second floor and attempted to have the occupant to that apartment give a false story on his behalf; the second-floor occupant became hysterical and the ensuing commotion could not help but alert anyone remaining in the fourth-floor apartment. The commotion in *Vasquez* thus was not instigated by the agents' tactics but by the arrestee's deceit.

In the present case, we agree with the conclusion of the district court that a warrantless entry of 3D to conduct a security check was not justified by the circumstances and that that entry was therefore unlawful.

B. *The Post-Warrant Evidence*

Leaving aside for the moment the question of the evidence discovered upon the unlawful entry into the apartment, *see* C, *infra*, we turn to the question of the evidence discovered in the apartment after the issuance of the search warrant. The district court found that the warrant itself was valid, but ruled that the illegality of the initial entry, coupled principally with the unreasonableness of the delay in obtaining the warrant, required the suppression of the evidence discovered after the warrant was issued. We conclude that our prior decision in *United States v. Agapito*, *supra*, is controlling and requires the contrary result.

As discussed earlier, the agents in *Agapito* sought to justify their warrantless entry into a hotel room as a security check to prevent the destruction of evidence. We found the facts insufficient to justify a security check and ruled their entry unlawful. Notwithstanding the purported desire of the *Agapito* agents to make a quick security check, when they found the hotel room empty they did not simply secure it until a search warrant could be obtained; they "moved in" and remained there intermittently for nearly twenty-four hours before a warrant was obtained. During their unlawful stay in the room the agents seized a suitcase, although they did not at that time open it or otherwise search the room. Eventually a search warrant, which we held to be valid, was issued. Upon issuance of the warrant the agents searched the suitcase and discovered one kilogram of cocaine. Notwithstanding the illegal entry, the 24-hour delay in obtaining a warrant, and the agents' unlawful occupation of the room for that lengthy period, we held that the cocaine found in the suitcase should not be suppressed because the cocaine was discovered pursuant to a valid search warrant.

We find no difference in the facts of the present case sufficient to justify deviation from the result reached in *Agapito*. Here, as there, there was an unlawful entry in circumstances that did not justify the intended security check of the premises; here the agents remained unlawfully on the premises for nineteen hours prior to issuance of a

search warrant, as compared with twenty-four in *Agapito*; here there was a valid warrant, as there was in *Agapito*; and here, as there, we deal with evidence discovered after the valid warrant issued.

The only difference between the present case and *Agapito* is that in *Agapito* the hotel room was empty, whereas there were people in the Segura-Colon apartment, a difference we do not consider material. The district court gave effect to this difference by hypothesizing that, had there been no illegal entry, Colon and her companions might have destroyed the evidence in the apartment prior to the issuance of the warrant. The hypothesis that had it not been for the unlawful entry perhaps no evidence would have been discovered lawfully is unpersuasive, in part because it is based on wholly speculative assumptions, such as (1) that having decided not to enter the apartment until a warrant was obtained, the agents would nevertheless have taken Segura to the apartment and alerted Colon; or (2) that having decided not to enter prior to obtaining a warrant the agents would not have kept the apartment under surveillance; or (3) that, once alerted, Colon would have sought to eliminate the evidence (including valuable cocaine and more than $50,000 in cash) by destroying it within the apartment rather than by removing it from the apartment, so that the agents would have no opportunity to intercept persons removing evidence; or (4) that the destruction of nearly three pounds of cocaine, more than $50,000 in cash, numerous celophane bags, and documents would be achieved without the telltale sounds of repeated toilet flushings or an odoriferous fire; or (5) that a triple-beam scale and eighteen rounds of ammunition could be destroyed silently.

Further, we cannot uphold the district court's decision to penalize the unlawful entry simply on the basis that persons were in the apartment who might otherwise have destroyed the evidence, because we find such a basis prudentially unsound. Under Fourth Amendment jurisprudence the fact that such persons were present—meaning that the agents happened to be correct in one of the unsupported beliefs that led them to enter—does not legitimate the agents'

entry; the reasonableness of the entry turns on the objective reasonableness of the beliefs, not on their accuracy. The effect of the district court's ruling, however, would be not only to preclude the officers' reliance on their happenstance accuracy, but in fact to penalize them for that accuracy. That is, upholding the district court's decision would mean that we suppress the evidence when, as here, the agents happened to be right in believing that there was someone in the premises to destroy it, while we do not suppress it where, as in *Agapito*, the agents' belief turned out to be wrong. We do not believe the appropriate protection of Fourth Amendment rights requires such an ironic twist.

In sum, *Agapito* is virtually indistinguishable from the present case and requires that the evidence discovered pursuant to the issuance of the valid search warrant not be suppressed.

C. *The Pre-Warrant Evidence*

Finally, we reject the government's argument that the evidence discovered during the unlawful security check should not be suppressed because it was not actually "seized" until after the search warrant was obtained. While *Agapito* allows use of evidence discovered after the issuance of a valid search warrant, it does not forbid suppression of evidence discovered upon an unlawful entry prior to the issuance of the warrant. We are not inclined to extend *Agapito* to allow use of the unlawfully discovered pre-warrant evidence in this case where the agents literally and figuratively went out of their way to create the circumstances that they contend constituted the emergency justifying entry. In the words of *United States v. Rosselli*, *supra*, in which agents similarly knocked at the suspects' door and thus alerted them,

> [w]e do not suggest that the emergency which did develop was contrived by the agents. They had a right to pursue their investigation by seeking voluntary cooperation from a suspect. But certainly the emergency which did ensue was foreseeable. Moreover, this type of situation may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed

> by a neutral and detached magistrate before the citizen's privacy is invaded.

506 F.2d at 630. Given the potential for abuse of the emergency security check exception by officers who would create their own emergencies, we believe it appropriate "'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975), quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). Accordingly, we uphold the suppression of such evidence as was discovered upon the unlawful entry.

CONCLUSION

The order of the district court is affirmed insofar as it suppressed items discoverd prior to the issuance of the search warrant, and reversed insofar as it suppressed items discovered after issuance of the warrant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(T. 21, U.S.C. §§ 841(a)(1) and 846)

UNITED STATES OF AMERICA

—against—

PREMISES KNOWN AND DESCRIBED AS APT. 3D,
37-07 147TH STREET FLUSHING, NEW YORK

AFFIDAVIT FOR A SEARCH WARRANT

EASTERN DISTRICT OF NEW YORK, SS:

ROBERT PALUMBO, being duly sworn, deposes and says that he is a Special Agent of the Drug Enforcement Administration, duly appointed according to law and acting as such.

Upon information and belief, there is currently being concealed in APT. 3D, 37-07 147th STREET, FLUSHING, NEW YORK narcotics, the proceeds of narcotics transactions, documents evidencing narcotics transactions and narcotics paraphenalia.

The source of your deponent's information and the grounds for his belief are:

1. At approximately 5:25 p.m., on February 12, 1981, ENRIQUE RIVADULLA and ESTHER PARRA were arrested by agents of the Drug Enforcement Administration on the street in front of 90-10 34th Avenue, Jackson Heights, New York in possession of approximately one pound of cocaine.

2. Following his arrest, RIVADULLA informed agents that he received the cocaine from an individual named ANDREAS SEGURA earlier that day at a Burger King Restaurant located at 223rd Street and Northern Boulevard, Bayside, Queens.

3. Surveillance by your deponent and other members of the Drug Enforcement Administration earlier that day confirmed that RIVADULLA and SEGURA had in fact met

earlier that day at the above-described Burger King Restaurant.

4. RIVADULLA further stated that SEGURA had told him that he (SEGURA) had an additional quantity of cocaine at his home. Based upon prior surveillance of SEGURA by the Drug Enforcement Administration, it has been determined that SEGURA resides at 37-07 147th Street, Apt. 3D, Flushing, Queens, New York.

5. At approximately 6:00 p.m. on February 12, 1981, agents of the Drug Enforcement Administration went to 37-07 147th STREET, QUEENS, NEW YORK to secure the premises in the anticipation of obtaining a search warrant. At approximately 11:15 p.m., agents observed SEGURA approach apartment 3D at the location and attempt to enter. At that time SEGURA was placed under arrest. Following his arrest SEGURA admitted that he kept additional quantities of narcotics in the apartment.

WHEREFORE, your deponent respectfully requests that a warrant issue to the said deponent or any other Special Agent of the Drug Enforcement Administration authorizing him to search the premises at APT. 3D, 37-07 147th STREET, FLUSHING, NEW YORK, for narcotics, the proceeds of narcotics transactions, documents evidencing narcotics transactions and narcotics paraphenalia.

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A TRUE COPY

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U.S.M. E.D.N.Y.

Sworn to before me this 13th day of February, 1981

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UNITED STATES MAGISTRATE
EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 82-1062, 82-1064

UNITED STATES OF AMERICA, APPELLEE,

v.

ANDRES SEGURA AND LUZ MARINA COLON,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of New York

OPINION—JUNE 29, 1982

Present: HONORABLE JAMES L. OAKES, HONORABLE THOMAS J. MESKILL, HONORABLE AMALYA L. KEARSE, *Circuit Judges*,

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendants Andres Segura and Luz Marina Colon appeal from judgments entered in the United States District Court for the Eastern District of New York, after a jury trial before John R. Bartels, Judge, convicting them of conspiring to distribute cocaine, in violation of 21 U.S.C. § 846 (1976), and of distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). Finding no merit in any of their contentions on appeal, we affirm.

1. Defendants contend that various items found in their apartment and admitted at trial should have been suppressed because they were seized pursuant to a search warrant that was invalid in that it was procured on the basis of material misrepresentations. This issue is foreclosed by reason of our prior ruling in this case in *United States v. Segura*, 663 F.2d 411 (2d Cir. 1981). On the prior appeal,

the government sought to overturn a ruling of the district court suppressing all evidence seized in the apartment of Segura and Colon. The district court had ruled the search warrant valid, but had suppressed all evidence seized in the apartment on the ground that the initial entry of the government agents had been unlawful. The government requested a reversal as to all of the evidence seized, on the ground that the initial entry was necessitated by exigent circumstances, or alternatively a reversal as to some of the evidence, on the ground that it was discovered and seized pursuant to a valid search warrant issued after the initial entry. Notwithstanding that the validity of the warrant was the linchpin of the government's "fallback" position, the defendants never argued that the search warrant was invalid, although they were entitled to make such an argument in support of the suppression order. *United States v. Swarovski*, 557 F.2d 40, 49 (2d Cir. 1977) (citing *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970)), *cert. denied*, 434 U.S. 1045 (1978); *see Smith v. Phillips*, 102 S.Ct. 940, 945 n.6 (1982). Even after we accepted the government's alternative contention by reversing the suppression of the evidence seized after the issuance of the warrant, Segura and Colon did not challenge the validity of the warrant. They moved for rehearing, but asked that we reconsider our ruling allowing use of "the evidence discovered pursuant to the valid search warrant" solely on the ground that the case we had found controlling, *United States v. Agapito*, 620 F.2d 324 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980), had been wrongly decided. (Petition of Segura and Colon for Rehearing, filed November 20, 1981, at 2.) Since Segura and Colon had adequate opportunities on the prior appeal to present their contentions as to the validity of the search warrant, we see no reason not to rule that our prior decision as to that issue is the law of the case. *See McClain v. United Staes*, 676 F.2d 915, 917 (2d Cir. 1982).

Even if the attack on the validity of the warrant were not foreclosed, however, we would reject it for lack of merit. Defendants have pointed to no evidence to suggest that the district court should have found the misstatements in the

affidavit seeking issuance of the search warrant to be deliberate or reckless falsehoods. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). The misstatements alleged were the agent's interpretations of statements made to him, and his interpretation of Segura's use of the term "stuff" as referring to narcotics was consistent with common usage in the trade. *See, e.g., United States v. Beltempo*, 675 F.2d 472, 475 (2d Cir. 1982); *Unied States v. Martino*, 644 F.2d 860, 874 (2d Cir. 1981). The district court's implicit ruling that the variance between statements and interpretations was not material is not clearly erroneous.

2. Segura and Colon also contend that the evidence at trial was insufficient to support their convictons. The evidence included (1) the government agent's observations of the meeting between Segura and Enrique Rivdulla at a restaurant at which neither they nor anyone accompanying them obtained food; Segura's gesture to Colon who then left the restaurant with a bulging pocketbook, entered the automobile of Rivdulla, and emerged moments later with no bulge in the purse; and the arrests minutes later of Rivdulla and his companion with a half kilogram of cocaine; and (2) the items found in the apartment of which Segura and Colon were co-lessees, including one kilogram of cocaine, $56,000 in cash, and a notebook apparently recording transactions with, *inter alios*, "Enrique." Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), we conclude that a rational juror could have concluded beyond a reasonable doubt that each defendant was guilty of conspiracy to distribute cocaine and of distribution of, and possession with intent to distribute, cocaine.

The judgments are affirmed.

/S/ JAMES L. OAKES
JAMES L. OAKES

/S/ THOMAS J. MESKILL
THOMAS J. MESKILL

/S/ AMALYA L. KEARSE
AMALYA L. KEARSE
Circuit Judges

Supreme Court of the United States

No. 82-5298

ANDRES SEGURA AND LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

FEBRUARY 22, 1983